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Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1618

In the Supreme Court of the United States

OCTOBER TERM, 1987

DANIEL L. LEWICKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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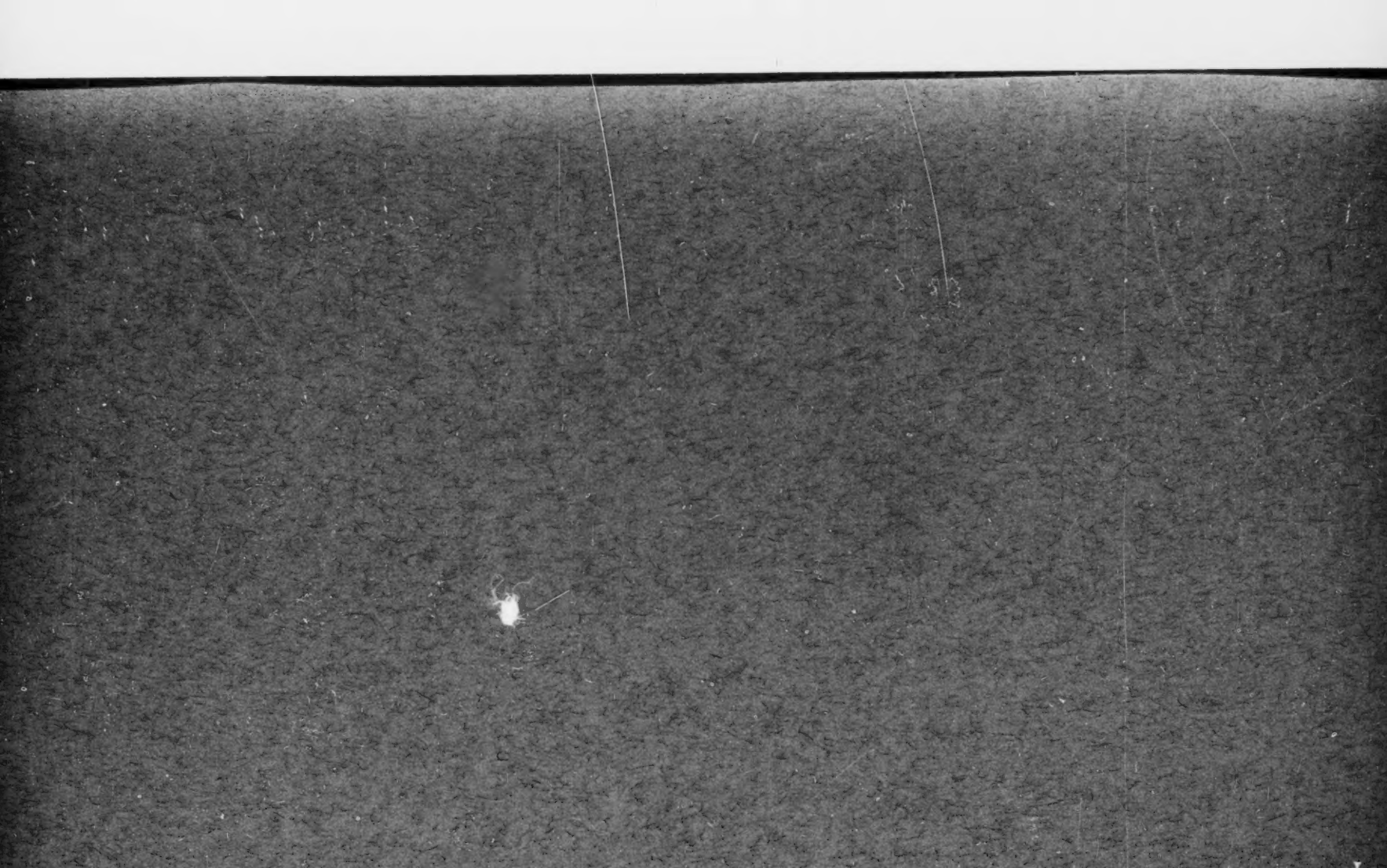

QUESTION PRESENTED

Whether the admission as an excited utterance of statements made by petitioner's four-year-old neighbor to her mother violated the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a-2a) is reported at 26 M.J. 63. The opinion of the Army Court of Military Review (Pet. App. 3a-4a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 2, 1988. The petition for a writ of certiorari was filed on March 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Devens, Massachusetts. He was convicted of taking indecent liberties with two children under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to a dishonorable

discharge. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed by order (*id.* at 1a-2a).

1. On June 2, 1984, Jennifer Aspinwall and petitioner's daughter Candice Lewicki, two four-year-old girls, were left in the exclusive care of petitioner from approximately 3:00 p.m. until 4:30 p.m. (GX 3; Tr. 179-203). Petitioner's wife was working at the time (Tr. 197). While the children were in his care, petitioner allowed the children to expose his genitals and to touch his penis.

a. In a sworn pretrial statement given to an agent of the Army's Criminal Investigation Division,[1] petitioner admitted that he played with the children, and that Jennifer Aspinwall sat on his lap. Her "squirming about" caused him to become sexually aroused, "meaning that [petitioner] was getting an erection" (GX 3; Tr. 174). Petitioner stated that he went upstairs to lie down (GX 3; Tr. 175). The children followed him. They induced petitioner to play by placing clothing under their shirts and pants. Petitioner's role in the game was to pull the clothing out. Jennifer placed clothing under her shirt in a manner that, to petitioner, at least, resembled breasts (*ibid.*). Petitioner admitted that he reached beneath the girls's shirts and inside their pants to remove the clothing placed there, but he denied putting his hand inside the girls' underwear (*ibid.*). Petitioner stated that he had unbuttoned his pants and

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[1] Petitioner did not challenge the voluntariness of his statement at trial, although he did claim that his statement was not corroborated, as required by Mil. R. Evid. 304(g) (AX 7; Tr. 172). Under that Rule, a defendant's statement may be considered as evidence of his guilt only if independent evidence, direct or circumstantial, sufficiently corroborates the essential facts of the statement as to justify an inference that it is truthful.

partially lowered his zipper "so [he] could rest comfortably" (*ibid.*). The children started to pull on his pants and underwear, exposing his genitals (GX 3; Tr. 175, 179). Petitioner admitted he was fully aware of what was occurring and that he did nothing to stop the children (GX 3; Tr. 176). He knew that he was feeling something that he should not be feeling, and it scared him (GX 3; Tr. 176). Petitioner conceded that he should not have permitted the children to do what they were doing, but he did not explain why he failed to stop them (GX 3; Tr. 177).

Petitioner had a partial ejaculation (GX 3; Tr. 176). He asserted that his ejaculation was unrelated to the actions of the children, claiming he always had a release of seminal fluid when his erections subsided (*ibid.*). Although petitioner did not realize that he had partially ejaculated until he permitted the children to expose his penis, he claimed that his ejaculation occurred before the children entered the room (GX 3; Tr. 178).

Petitioner's daughter, Candice, put her hand on her father's penis for several seconds (GX 3; Tr. 176). Petitioner admitted that his daughter may have rubbed his penis while touching it (GX 3; Tr. 177). Petitioner apparently did nothing to prevent or interrupt the contact. Candice removed her hand and said something to Jennifer, who also touched petitioner's penis (GX 3; Tr. 176).

Petitioner went to the bathroom where he cleaned his penis and waited until his erection subsided (GX 3; Tr. 176). Petitioner returned and told the children they should not touch people "in that area" (GX 3; Tr. 177). Petitioner also admitted telling the children that they should not tell anyone else what had happened.[2] Petitioner then went to

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[2] Petitioner testified that, when he told Jennifer Aspinwall that he was going to tell her parents what had occurred, Jennifer started whimpering, assumed a fetal position, and then started crying (Tr. 198).

sleep (*ibid.*).[3]

b. Jennifer and Candice returned to the Aspinwall residence at approximately 4:30 p.m. Jennifer's mother invited Candice to stay for dinner. As the children left to ask permission from Candice's parents, Jennifer told her mother, "we have a secret and we can't tell you or Daddy or [petitioner's spouse]" (Tr. 137).[4] The children returned and went upstairs to eat (Tr. 138-139). Candice went home at approximately 8:00 p.m. that night, and Mrs. Aspinwall decided to wash Jennifer's hair (Tr. 139). While Mrs. Aspinwall dried Jennifer's hair, Jennifer said "[petitioner] was pulling little toys out of our britches," Jennifer's term for underwear (Tr. 140-141).[5]

Mrs. Aspinwall was concerned, but behaved as if there was "no problem" (Tr. 140). When Mrs. Aspinwall asked Jennifer to tell her more about what happened, Jennifer told her, "This is a secret that we're not supposed to tell" (Tr. 141). Jennifer told her mother that petitioner had been pulling "toys" out of Candice's underwear too (*ibid.*). Jennifer was "giggly," "fidgety," and "nervous" (*ibid.*). Mrs. Aspinwall asked if petitioner had touched Jennifer between the Legs. Jennifer said no. Her demeanor was

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[3] At trial, petitioner recanted his prior, sworn admissions (Tr. 189). He specifically claimed that he was asleep when the children pulled his pants down (Tr. 182-183, 189). He also claimed that he did not know whether the children touched his penis (Tr. 190). Petitioner explained that he had lied in his sworn statement to "protect" Jennifer Aspinwall and his daughter from interrogation by the Army's Criminal Investigation Division (Tr. 188, 190).

[4] Mrs. Aspinwall testified that when Jennifer said that she and Candice had a secret, petitioner's daughter "went very rigid" and was trembling (Tr. 137-138). Jennifer told Candice not to worry and that she would not reveal their secret (Tr. 138).

[5] At the pretrial hearing, Mrs. Aspinwall testified that she learned from Jennifer that "toys" meant clothes (Tr. 38).

"real serious" (*ibid.*). She was very upset and started to get "blotchy," indicating that she was about to cry (*ibid.*).

When Mrs. Aspinwall asked what else had occurred, Jennifer began to cry (Tr. 142). She told her mother that petitioner had said that because it was alright for him to pull "toys" out of their britches, it was alright for them to pull toys out of his (*ibid.*). Jennifer was "truly upset" (*ibid.*) and cried "real hard" as she told her mother that petitioner had pulled his pants down and "let his thingy fall out" (*ibid.*). Mrs. Aspinwall let her stop crying before she asked what happened next (*ibid.*). Jennifer told her mother that petitioner had said the children could play with his "thingy" (Tr. 142-143) and that she and Candice had done so (Tr. 142). Mrs. Aspinwall comforted Jennifer for a few minutes, gave her a bath, and put her to bed (Tr. 142-143). After her husband arrived, they called the police, who arrived immediately (Tr. 144). Because Jennifer was in bed, she was not questioned at that time (Tr. 148).

Two CID agents came to the house the next day and, together with her parents, tried to ask Jennifer what had happened (Tr. 149). She told them about petitioner pulling the "toys" out of her britches. When pressed for more detail, however, she began to cry (*ibid.*). She repeatedly said, "I don't remember" (*ibid.*).[6]

Jennifer's behavior subsequently became quite erratic. Her mother saw her playing with herself and exposing herself to other children (Tr. 145-146), which she had

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[6] Mrs. Aspinwall testified during the motion hearing that Jennifer had never told her a similar story (Tr. 40). Mrs. Aspinwall also indicated that she and her husband were "fussy" concerning the influences to which their children were exposed (Tr. 144). They monitored the television programs that Jennifer watched, and they maintained no sexually suggestive materials in the house (Tr. 144-145).

never done before. At the same time, Jennifer also showed concern about anyone seeing her in a state of undress (Tr. 146), and she exhibited other atypical behaviors.[7] Jennifer's parents sought the assistance of Dr. Richard Judah, a psychologist.[8]

2. Petitioner moved before trial to exclude Jennifer's statements to her mother. He argued that the statements were not admissible under Mil. R. Evid. 803(2)[9] as excited utterances because three-and-one-half to five hours had passed between the time of the alleged incident and the time that Jennifer uttered her statements (AX 5, at 3). Petitioner also maintained that the Confrontation Clause barred the admission of the statements, because the government could have subpoenaed Jennifer to testify at trial (*id.* at 4). At a pretrial hearing on petitioner's motion, the government presented the testimony of Dr. Judah. Dr. Judah testified that it would not be in Jennifer's best interest to appear as a witness in the absence of special preparation for the questioning she would face about the experience (Tr. 72). He indicated that the experience could be very upsetting to Jennifer (Tr. 73), and that there was a

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[7] These included masturbatory gestures (Tr. 146), and regressive, baby-like behavior (Tr. 146-147). During her testimony on the motion, Mrs. Aspinwall also indicated that Jennifer had sleep disturbances, including nightmares. Jennifer had never had problems sleeping prior to the incident (Tr. 43-44).

[8] Dr. Judah did not testify at trial, although he did testify at a hearing on the admissibility of Jennifer's statements to her mother and at sentencing (Tr. 55-96, 272-286). Dr. Judah met with Jennifer Aspinwall alone and with her mother present (Tr. 58-59). His testing and interviewing led him to conclude that Jennifer had been subjected to sexual molestation (Tr. 69). He also believed that Jennifer "definitely" needed psychological counseling as a result of the molestation (Tr. 65).

[9] Mil. R. Evid. 803(2) was adopted without change from the Federal Rules of Evidence.

greater potential for the experience to be traumatic rather than beneficial (Tr. 75). Dr. Judah testified that Jennifer could possibly testify "if certain conditions which are probably uncommon to courts" were considered (*ibid.*). Those conditions included "a lot of preparation," being accompanied by someone she trusted, and meeting the judge in closed chambers with her parents (Tr. 75-78). According to Dr. Judah, petitioner's presence could bias her responses (Tr. 77). Petitioner offered no contrary evidence, and he did not contend that the prosecution should be required to prepare Jennifer to testify in the manner suggested by Dr. Judah.

The trial judge denied petitioner's motion and permitted Mrs. Aspinwall to testify about Jennifer's statements to her (Tr. 102). Petitioner did not subpoena Jennifer, and she did not testify at trial. See *ibid.* (trial court noted that defense did not request that a subpoena be issued for Jennifer); Defense Request for Witnesses (Aug. 28, 1984) (omitting Jennifer). At the close of the case, the trial judge instructed the panel that Jennifer's statements were excited utterances under Mil. R. Evid. 803(2) (Tr. 241-242).[10] The judge also found that the excited utterances were sufficient to corroborate petitioner's admissions (Tr. 103), and the judge therefore admitted petitioner's sworn statement (GX 3; Tr. 174-179). The panel convicted petitioner by exceptions and substitutions.[11]

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[10] Although no limiting instruction was given by the trial judge concerning the panel members' consideration of the excited utterances, petitioner did not request such an instruction, and he specifically indicated that he had no objection to the instruction proposed by the trial judge (Tr. 226).

[11] Petitioner was originally charged with taking indecent and immoral liberties with two girls under the age of 16 years by "*telling* them to touch his penis, and *having* them touch his penis" (Tr. 9 (emphasis added)). He was convicted of "*encouraging* them to touch his penis, and *allowing* them to touch his penis" (Tr. 270 (emphasis added)).

3. The Army Court of Military Review affirmed (Pet. App. 3a-4a). It found that petitioner's failure at any time to request that Jennifer Aspinwall be called as a witness was inconsistent with his claim that his confrontation rights had been violated (*id.* at 4a). The Court of Military Appeals summarily affirmed by a divided vote, holding that petitioner's right of confrontation was not violated (*id.* at 1a-2a).[12]

ARGUMENT

Petitioner claims that Jennifer Aspinwall's statements to her mother were admitted into evidence in violation of the Confrontation Clause of the Sixth Amendment. Petitioner's claim, however, is quite narrow. Petitioner does not contend that Jennifer Aspinwall's statements were not excited utterances, nor does he argue that the excited utterance exception to the hearsay rule is not firmly rooted.[13] Instead, petitioner argues that Jennifer

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[12] Judge Sullivan concurred in the result without opinion (Pet. App. 1a). Chief Judge Everett dissented for the reasons given in his dissenting opinion in *United States* v. *Arnold*, 25 M.J. 129, 134-135 (C.M.A. 1987), cert. denied, No. 87-832 (Feb. 22, 1988), in which he concluded that similar statements were not excited utterances, because of the delay between the time of the incident and the time that the child made the statements.

[13] The courts of appeals have agreed that the excited utterance exception is firmly rooted in the common law. *Puleio* v. *Vose*, 830 F.2d 1197, 1205-1206 (1st Cir. 1987) (citing a long history of cases over the past 200 years approving the excited utterance exception); *United States* v. *Moore*, 791 F.2d 566, 574 (7th Cir. 1986); *Haggins* v. *Warden*, 715 F.2d 1050 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984); *McLaughlin* v. *Vinzant*, 522 F.2d 448, 450 (1st Cir.), cert. denied, 423 U.S. 1037 (1975); *United States* v. *Arnold*, 25 M.J. at 133 (opinion of Cox, J.); see also *United States* v. *Cree*, 778 F.2d 474, 502 (8th Cir. 1985) (Oliver, J., dissenting).

Aspinwall's statements should not have been admitted because the government failed to show that she was unavailable to testify at trial and because her statements were not sufficiently reliable. Neither claim has merit.

1. Petitioner relies (Pet. 5-9) on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), to support his claim that the government should have been required to prove that Jennifer Aspinwall was unavailable. *Roberts*, however, does not require proof of the declarant's unavailability as a prerequisite to the admission of every out-of-court statement. *Roberts* involved the question whether the admission at trial of testimony given at a preliminary hearing violated the Confrontation Clause, and the cases cited and discussed in the Court's opinion involved the introduction at trial of testimony given at a prior judicial proceeding. *Id.* at 65, 74. The statement in *Roberts* on which petitioner relies—that an out-of-court statement is inadmissible unless the declarant is shown to be unavailable (*id.* at 69)—must be read in light of the facts of that case. As this Court subsequently explained in *United States* v. *Inadi*, 475 U.S. 387, 394 (1986) (citations and footnote omitted), "*Roberts* simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable."

Although petitioner claims that *Inadi* stands only for the proposition that co-conspirator declarations can be introduced without the need to show that the declarant is unavailable, the rationale of *Inadi* is broader than that. The Court in *Inadi* distinguished prior testimony—requiring a showing of unavailability—from other kinds of testimony, not just from co-conspirator declarations. While former testimony "often is only a weaker substitute

for live testimony," the Court explained, other exceptions to the hearsay rule have "independent evidentiary significance of [their] own." 475 U.S. at 394.

The *Inadi* analysis also applies to excited utterances. Like a co-conspirator declaration, an excited utterance "often will derive its significance from the circumstances in which it was made." 475 U.S. at 395. As in the case of a co-conspirator declaration, an excited utterance may be even more reliable than subsequent in-court testimony, because the relationship between the parties at the time of trial may significantly affect the reliability of the evidence the declarant gives from the stand. Thus, like co-conspirator declarations, excited utterances "derive much of their value from the fact that they are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 395-396.[14]

Concerns over reliability do not justify requiring the government to prove that a declarant is unavailable before the trial court may admit excited utterances. The primary function of the Confrontation Clause is to enhance the reliability of the fact-finding process at trial.[15] The historical process of defining exceptions to the hearsay rule has identified classes of out-of-court statements that are particularly reliable. For that reason, the Court has explained that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Roberts,* 448 U.S. at 66.

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[14] Dean Wigmore noted that evidence of this nature is "better than is likely to be obtained from the same person upon the stand." 6 J. Wigmore, *Evidence* § 1748, at 199 (Chadborn rev. ed. 1976).

[15] "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process." *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion); see also *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985); *Roberts*, 488 U.S. at 66.

Excited utterances have historically been admissible as exceptions to the hearsay rule, because they are made under circumstances indicating that they are sincere and because they ordinarily are made before a person develops a motive to fabricate. See *McCormick on Evidence* § 297, at 855 (3d ed. 1984). For those reasons, excited utterances are sufficiently reliable that the additional safeguard of cross-examination is not constitutionally required. Excited utterances are admissible without a showing of unavailability, not because the Confrontation Clause is "a codification of the rules of hearsay," but because an excited utterance is one example of the situation where "the overlap is complete" between the constitutional provision and the hearsay rules (*California* v. *Green*, 399 U.S. 149, 155 (1970)), and because cross-examination is not necessary to ensure reliability.[16]

Petitioner's argument that the government should have been required to produce Jennifer rests largely on his claim that his pretrial statement was "exculpatory" (Pet. 4, 7) and his corollary assertion that he was convicted solely on the basis of Jennifer's excited utterances (Pet. 4, 6-7, 12). Since both claims are erroneous, petitioner's argument falls with its premises.

Petitioner's pretrial statement is not exculpatory;[17] nor did petitioner describe his statement in that manner at

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[16] Indeed, the record indicates that petitioner did not want Jennifer to testify at trial. At a pretrial hearing, petitioner asked the trial judge to subpoena Jennifer and reopen the Article 32, UCMJ, 10 U.S.C. 832, pretrial investigation, or to order that the defense be allowed to depose Jennifer and to issue a subpoena for the deposition (AX 2; Tr. 15, 21). Petitioner declined to ask the trial judge to subpoena Jennifer to testify at trial.

[17] Petitioner admitted (GX 3; Tr. 175-176) that:

> The kids came into the room again and at this time somehow they both started to pull on the front pockets area of my pants and my

trial. On the contrary, at trial petitioner sought to exclude his admissions from evidence on the ground that they had not been corroborated (AX 7; Tr. 172). Petitioner's vigorous attempts to keep his pretrial statements out of evidence thoroughly refute his present claim that those statements were exculpatory.[18] It is also inaccurate to claim, as petitioner does, that he was convicted "solely" (Pet. 4, 12) on the basis of Jennifer's statements. Petitioner's sworn pretrial statement made him the principal architect of his own conviction. Jennifer's excited utterances, although independently admissible, served to corroborate petitioner's admissions.

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pants started to come down (unzip). My pants never left my hip behind me but the front part was pulled down to expose my underwear. At that time the girls both pulled on my underwear down to expose my penis, it was pulled down to the extent that the pants and the underwear were below my scrotum exposing my penis and the scrotum. I was fully aware of what was going on but did not do anything to stop them. I knew that I was feeling something that I shouldn't have been feeling and it scared me. At that point, I realized that I had had a partial ejaculation as there was seminal fluid on my hip area. The reason that occurred was because my penis had started to go down and I always have a release of seminal fluid when my penis goes down. I did not have a full ejaculation nor was the partial ejaculation a result of any caressing on the girls' or my part. As this point, Candice then put her hand around on my penis and kept it there at the most 2-3 seconds. She then removed it and said something to Jennifer in a way to prompt her to do the same thing. Jennifer then touched me in a way that she was slapping it just to see what it felt like.

[18] Petitioner clearly recognized at trial that this pretrial statement was inculpatory. He disavowed those portions of the statement in which he admitted that he was awake when the children pulled down his pants and touched his penis, and his statement that he remembered that the children actually touched his penis. The point was not lost on the panel members. One of the panel members asked petitioner (AX 11; Tr. 216), " 'How do you account for the drastic differences between your testimony and your signed [pretrial] statement?' "

2. Although petitioner concedes that the excited utterance exception is a firmly rooted exception to the hearsay rule (Pet. 10), he maintains that Jennifer Aspinwall's excited utterances lacked sufficient indicia of reliability to satisfy the Confrontation Clause. That claim lacks merit. As this Court explained in *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10 (citation omitted), "*Roberts* itself limits the requirement that a court make a separate inquiry into the reliability of an out-of-court statement. * * * [N]o independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' "

In any event, Jennifer's statements to her mother were trustworthy. In the first place, Jennifer's statements were corroborated by petitioner's own pretrial statement, which served as powerful support for the reliability of Jennifer's statements. Moreover, when due consideration is given to Jennifer's age, the testimony given by Jennifer's mother and Dr. Judah that Jennifer had suffered psychological trauma, and the impulsive, nondeliberative nature of Jennifer's statements to her mother, the reliability of those statements is apparent.[19] Additionally, there was no evidence that Jennifer had any motive to fabricate her accusations. Indeed, Mrs. Aspinwall testified that Jennifer liked petitioner a great deal and that he had been "a great friend" (Tr. 150). Under these circumstances, Jennifer's statements to her mother were sufficiently reliable to

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[19] The lapse of time between a startling event and the out-of-court statement, although relevant, is not dispositive of the application of Rule 803(2). *United States* v. *Iron Shell*, 633 F.2d 77, 85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). Additionally, Jennifer's statement, couched in "childish terminology," has "the ring of verity and is entirely appropriate to a child of [her] tender years." *United States* v. *Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979).

justify their admission even though she was not present at trial.

Petitioner argues (Pet. 12) that Jennifer's statements were unreliable because they were not volunteered but were elicited by her mother, and because Jennifer gave conflicting accounts to her mother and to Dr. Judah as to whether she touched petitioner's penis.[20] Petitioner did not rely on either ground at trial,[21] but neither one is persuasive. If petitioner had wanted to point out a discrepancy, he could have done so in other ways. Jennifer's mother testified at trial (Tr. 133-152), and petitioner could have questioned her about the manner in which she asked Jennifer about the incident. Moreover, even if petitioner did not want to call Jennifer as a witness, he could have sought to introduce her statements to Dr. Judah pursuant to Mil. R. Evid. 803(4), which allows hearsay statements made for the purpose of diagnosis or treatment to be admitted at trial. *United States* v. *Welch*, 25 M.J. 23

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[20] Petitioner asserts (Pet. 12) that "Dr. Judah also presented a diagnosis which reflected on the reliability of the hearsay statement: that Jennifer's conduct was consistent with either an abused child (R. 65) or a lying child (R. 275)." Dr. Judah, however, did not testify that he believed Jennifer was lying about the incident. On the contrary, he testified that "I'm certain she has been subjected to sexual molestation" (Tr. 69; see also *id.* at 69-70, 93), and that he did not believe that she was lying (*id.* at 95: "[Trial judge]: Now, during this interview with her, were you able to tell whether she'd been truthful to all the answers, or do you feel that on some of them, she was being untruthful and trying to avoid some of the questions? [Dr. Judah]: I felt that she was becoming avoidant. I didn't think she was being, quote, untruthful. I think she was becoming more confused than anything.").

[21] Petitioner's pretrial motion argued that Jennifer's statements to her mother were unreliable because they were inconsistent with his own daughter's account of the incident (AX 5, at 4).

(C.M.A. 1987).[22] Petitioner apparently declined to pursue that option because of Dr. Judah's strongly held views that Jennifer was a victim of sexual abuse. Accordingly, the trial judge's ruling that Jennifer's statements were admissible did not deny petitioner the opportunity to challenge the reliability of those statements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

[22] Although the trial judge ruled that the government could not call Dr. Judah at trial as a prosecution witness (Tr. 102), petitioner never sought to have Dr. Judah testify as a defense witness.

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